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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re MICHAEL R., a Person Coming Under
the Juvenile Court Law.

C042993

THE PEOPLE,

(Super. Ct. No. 58430)

Plaintiff and Respondent,

v.

MICHAEL R.,

Defendant and Appellant.

The juvenile court adjudged 14-year-old Michael R. (the minor) a ward of the juvenile court and placed him on probation in a group home for a period not to exceed 16 years six months, based on an admitted allegation of petty theft (Welf. & Inst. Code, § 602; Pen. Code, § 484, subd. (a)); a sustained allegation of continual sexual abuse of a minor under the age of 14 (Pen. Code, § 288.5, subd. (a)); and, after dismissing an allegation of lewd conduct with a child under the age of 14 (Pen. Code, § 288, subd. (a)), a "reduced" charge of annoying a child under the age of 18 (Pen. Code, § 647.6).

On appeal, the minor contends the juvenile court erred by amending the petition without his consent to add a charge of annoying a child, because child annoyance is not a lesser included offense of lewd conduct with a child. The People concede the error. We accept the concession.¹

At the conclusion of the adjudication hearing, the juvenile court stated: "Count Five as to [the victim] is reduced to violation of Penal Code section 647.6, a misdemeanor, touching with the sexual intent. As to [the victim], on or about in August of 2001."²

The law in this area is settled. First, a violation of Penal Code section 647.6, subdivision (a) is not a lesser included offense of Penal Code section 288, subdivision (a). (*People v. Lopez* (1998) 19 Cal.4th 282, 294.)

Second, a juvenile court lacks jurisdiction to sustain a petition based upon a finding that the minor has committed an offense that is not alleged in the accusatory pleading or necessarily included in the alleged offense, absent the minor's consent to the charge. (*In re Robert G.* (1982) 31 Cal.3d 437, 445.)

¹ Because the juvenile court's action was invalid without the minor's consent, we need not reach his alternative argument that a failure to object to the action was ineffective assistance of counsel.

² The prosecutor suggested this finding.

As the People concede, the "consent" of a minor to a sustained finding of an uncharged offense may not be inferred from a failure to object or acquiescence to the actions of the juvenile court. (*In re Alberto S.* (1991) 226 Cal.App.3d 1459, 1464-1465.) The court's decision resulted in an implied acquittal of the greater charge, and the minor may not be retried for the violation of Penal Code section 288, subdivision (a). (*In re Johnny V.* (1978) 85 Cal.App.3d 120, 142.)

DISPOSITION

The finding of guilt as to count 5, violation of Penal Code section 647.6, is stricken. The maximum period of confinement is reduced to 16 years two months. In all other respects, the judgment (order adjudging a minor a ward of the juvenile court) is affirmed.

RAYE, J.

We concur:

BLEASE, Acting P.J.

DAVIS, J.